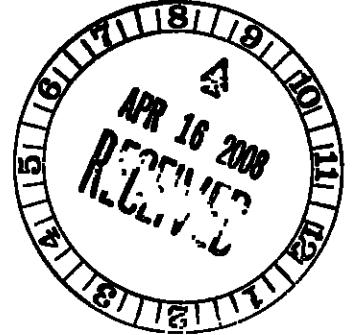


South Plains Switching, Ltd. Co.
P. O. BOX 64299 **LUBBOCK, TEXAS 79464**
PHO: (806)828-4841 **FAX: (806)828-4863**

222092

April 14, 2008



Anne K. Quinlan, Esq.
Acting Secretary
Surface Transportation Board
395 E Street, S.W., Suite 1149
Washington, DC 20024

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Office of Proceedings

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Public Record

Re: STB Ex Parte No. 677, *Common Carrier Obligation Of Railroads*

Dear Ms. Quinlan:

SOUTH PLAINS SWITCHING, LTD. CO. (SAW) hereby submits its written testimony on the common carrier obligation of railroads. SAW does not intend to participate in the public hearing before the Board on April 24, 2008.

Summary

Based on SAW's experience, it appears that the Board's staff applies the common carrier obligation strictly in the case of Class III rail carriers like SAW, but does not apply that obligation at all to Class I rail carriers, like BNSF Railway Company (BNSF). That kind of differing treatment does not bring credit on the STB.

SAW has had the nightmarish experience of having its railroad taken away based on a Board finding that its withdrawal of privileges granted to a shipper that were not

required by law constituted a violation of its common carrier obligation, even though there was no evidence that it ever failed to provide transportation on reasonable request. That seems to us to be contrary to law.

Application of the Common Carrier Obligation by Board Staff

1. Treatment of SAW

SAW acquired trackage at Lubbock, TX from BNSF in 1999. Beginning in 2005, several disputes between SAW and BNSF led to litigation in Texas Court.

During the course of that litigation, SAW received a request by O.E. Floyd Trucking Company (Floyd), a motor common carrier, that SAW reinstall a switch connection to trackage on property owned or controlled by Floyd that had been removed by SAW after many years of nonuse.

SAW doubted the legitimacy of that request because of the decrepit condition of the trackage in Floyd's property. SAW viewed Floyd's request as more likely to be a harassment tactic by BNSF. SAW hesitated to accede to Floyd's request because Floyd failed to identify the nature and volume of traffic that assertedly would be originated and/or terminated by Floyd if the switch were to be reinstalled. Pursuant to 49 U.S.C. § 11103(a), a switch connection is to be installed or reinstalled only when the connection "will furnish sufficient business to justify its construction and maintenance."

Floyd complained to the Board's Office of Compliance and Consumer Assistance about SAW's refusal to reinstall the switch. Notwithstanding the absence of evidence of the extent of rail business to be furnished if the switch were to be reinstalled, the Director of that Office advised SAW that the Board would bring legal action against SAW for

failure to provide transportation on request unless SAW reinstalled the switch connection.

Attached are exchanges of correspondence which reflect Staff's position.

In order to avoid such legal action, SAW reinstalled the switch connection at substantial expense. As SAW had feared, Floyd did not ship a single carload over SAW in all the time that the switch connection has been in place. Floyd refused to sign the standard railroad industry track agreement that is identical to the agreement that was in place when the Santa Fe Railroad previously served a shipper at that location.

Surely, the Floyd situation reflects an extremely strict (if not also legally erroneous) application of the common carrier obligation.

2. Treatment of BNSF

By virtue of the 1999 Sale Agreement with BNSF for the Lubbock trackage, SAW acquired specified tracks, as well as the turnouts (switch connections) to such tracks. One such track was Track No. 320. Notwithstanding BNSF's conveyance to SAW of the switch connection to Track No. 320, BNSF unilaterally removed that switch connection without notice to SAW.

Track No. 320 provides direct access to Plant No. 2 of PYCO Industries, Inc. (PYCO). That access is distinctly superior to alternative means of providing service to PYCO. During a service interruption via that alternative means, SAW requested that BNSF reinstall the switch to Track No. 320. PYCO joined in that request.

When BNSF refused to reinstall that switch, SAW requested that the Board's Office of Compliance and Consumer Assistance intercede to persuade BNSF to reinstall the switch. When BNSF flatly refused to reinstall the switch, the Director of that Office did not threaten to bring legal action against BNSF, as he had in regard to SAW. No

action was taken by that Office or by the Board regarding BNSF's refusal to reinstall the switch. Ironically, service to PYCO's Plant No. 2 suffered as a result of BNSF's failure to reinstall the switch, and the failure of Board Staff to aggressively seek reinstallation of the switch, but it was SAW, rather than BNSF or Board Staff, that shouldered the blame for service failures to PYCO's Plant No. 2.

The situation regarding the switch to Track No. 320 reflects a failure on the part of Board Staff to apply the common carrier obligation to BNSF in any degree at all. SAW submits that such differing treatment of SAW and BNSF by Board Staff cannot be reconciled with the common carrier obligation of railroads.

Application of the Common Carrier Obligation by the STB

PYCO experienced a substantial increase in business in late 2005. PYCO ordered many more railcars for transportation of that increased business, but PYCO lacked enough private trackage in its plants to accommodate those additional railcars. As a result, those railcars accumulated in SAW's railyard, and PYCO was unable to ship the desired quantity of traffic by rail. However, PYCO never requested that SAW provide additional daily or weekend switches to further PYCO's rail shipments. There was not a single instance in which SAW failed to provide transportation requested by PYCO.

Nevertheless, PYCO complained to the Board's Office of Compliance and Consumer Assistance that SAW was not providing adequate rail service to PYCO. Shortly thereafter, SAW withdrew privileges that SAW had been granting to PYCO that were not required by law. One such privilege was permitting PYCO's trackmobile to operate over SAW's tracks into SAW's yard to provide railcar switching. Another was a lease of track in SAW's yard area that SAW declined to renew when it expired.

Notwithstanding that PYCO was not entitled by law to continuation of those privileges, the STB found that SAW had thereby unlawfully retaliated against PYCO, worsening PYCO's inability to ship sufficient quantities by rail, and that such retaliation constituted a failure to provide adequate rail service (i.e., a violation of SAW's common carrier duty). On that basis, the STB ordered that a rail carrier other than SAW provide alternative rail service to PYCO.

Worse yet, in depriving SAW of its railroad permanently, the STB found that the basis for SAW's violation of its common carrier obligation to shippers other than PYCO was not that SAW had retaliated against those shippers in any way, but rather that those shippers had a legitimate fear that SAW would eventually retaliate against them as it had retaliated against PYCO.

SAW submits that:

- (1) if SAW's withdrawal of voluntary privileges afforded to PYCO constituted retaliation, it was lawful retaliation that did not in any way violate SAW's common carrier obligation; and
- (2) it is ludicrous to suggest that a shipper's fear that it might be subjected to retaliation in the future (lawful or not) is a rational basis for a finding that a rail carrier has violated its common carrier obligation.

It is especially ironic that SAW has lost its railroad for alleged violations of its common carrier obligation when it in fact prided itself on providing reliable, consistent rail service. However, as a small family-owned company, SAW lacked the financial wherewithal to appeal these erroneous rulings. We submit this testimony so that the

public will be aware of how the common carrier obligation was misapplied to SAW's substantial detriment.

Sincerely,

A handwritten signature in black ink, reading "Delilah Wisener". The signature is written in a cursive, flowing style with a large initial 'D' and 'W'.

Delilah Wisener
Owner
South Plains Switching, Ltd. Co.



Surface Transportation Board
Washington, D.C. 20423-0001

February 20, 2003

Office of Compliance and Enforcement

1925 K Street, N.W., Suite 780

Washington, DC 20423-0001

Mr. Larry Wisener, President

South Plains Lamesa Railroad Ltd.

P. O. Box 676

Slaton, TX 79364-0676 (And by Facsimile-(806-828-4863)

202-565-1573
 FAX 202-565-9011

Re: Floyd Trucking complaint, Lubbock, Texas

Dear Mr. Wisener:

This follows my letter to you of November 25, 2002, and our December meeting regarding a complaint received by this office from Mr. O. E. Floyd, Floyd Trucking, Inc., a prospective shipper on the South Plains Lamesa Railroad (SLAL) in Lubbock, Texas which has been seeking rail service since 1999, and our discussions regarding my concerns for your failure to satisfy your common carrier obligation under 49 U.S.C. 11101(a), based on your refusal to provide service to Floyd Trucking. At that meeting I requested that you provide Mr. Floyd and this office with a plan for the provision of the requested rail common carrier services.

I am in receipt of your letter to Mr. Floyd, dated January 15, 2003, purporting to provide such a plan (copy enclosed). The letter outlines the conditions Mr. Floyd must meet in order to receive service, including entering into a track lease agreement with your company, establishing the time period in which cars can be unloaded even though no service is being provided, determining from Burlington Northern Santa Fe Railway (BNSF) what its rates will be for the service Mr. Floyd intends, and subsidizing SLAL's installation of the switch connection to the line on which Mr. Floyd's facility is located in the amount of \$25,000.

Let me begin by clarifying the statutory obligations. First, 49 U.S.C. 11103(a) provides that, on application of the owner of a lateral branch line of railroad or a shipper tendering interstate traffic for transportation, a rail carrier providing transportation subject to the jurisdiction of the Board must construct, maintain and operate a switch connection to connect that branch line or side track with the railroad when the connection is reasonably practicable, can be made safely, and will furnish enough business to justify its construction and maintenance. It is well settled that it is the obligation of the railroad to connect shippers with the rail system in order to provide its common carriers services, and to adopt and observe reasonable practices for the installation and maintenance of switch connections and the prompt delivery of freight. Therefore it is my opinion that it would be considered unreasonable for SLAL to attempt to impose a fee upon a shipper for the installation or reinstallation of a switch connection, and that an effort to impose such a condition would be viewed as an economic embargo and considered unlawful. Moreover, so long as rate making is the responsibility of BNSF, as you have indicated it is, neither Floyd Trucking or any other shipper would be responsible to discuss those rate negotiations with SLAL. The presumption is that your revenue relationship would be with BNSF, with the exception of demurrage and charges for ancillary services.

Letter to Larry Wisener, Page 2.

Finally, considering the time period during which Mr. Floyd has been attempting to obtain service from SLAL (since 1999), and the time this matter has been before this office, I believe that you have been given a fair opportunity to address these service issues. As such, I will expect a resolution of these service issues by COB February 28, 2003. Failure to resolve these issues will result in my recommendation to the Board that it institute, on its own motion, a formal complaint proceeding to address the lawfulness of your actions involving Floyd Trucking and possibly other shippers, and the appropriateness of damages for any service failures or unlawful assessments.

Sincerely,

A handwritten signature in black ink, appearing to read "M. Clemens, Jr.", written over a circular stamp or seal.

Melvin F. Clemens, Jr.

Director

Enclosures

cc: Mr. O. E. Floyd, Floyd Trucking, Inc.

LAW OFFICE
THOMAS F. MCFARLAND, P.C.
208 SOUTH LASALLE STREET - SUITE 1890
CHICAGO, ILLINOIS 60604-1194
TELEPHONE (312) 236-0204
FAX (312) 201-9695
mcfarland@aol.com

THOMAS F. MCFARLAND

February 26, 2003

By fax to 202-565-9011

Mr. Melvin F. Clemens, Jr.
Director
Office of Compliance and Enforcement
Surface Transportation Board
1925 K Street, N.W. - Suite 780
Washington, DC 20423-0001

Re: Floyd Trucking complaint, Lubbock, TX

Dear Mel:

This refers to your letter of February 20 to Larry Wisener of South Plains Switching, Ltd. Co. (SAW); Mr. Wisener's response to you dated February 25; and prior correspondence relating to the above subject.

I have recently been retained by SAW. Based on my review of the matter, I am convinced that SAW is acting in good faith regarding Floyd Trucking. By that I mean that SAW is very much willing to provide rail service to Floyd Trucking if SAW can be assured that Floyd Trucking will furnish sufficient traffic to justify construction and maintenance of a switch connection necessary to provide service. SAW has been diligent in attempting to determine from Floyd Trucking the volume of traffic that it would furnish. However, Floyd Trucking has not provided that information.

As acknowledged in your letter of February 20, one of the prerequisites of a duty to provide a switch connection is a showing that the shipper will furnish sufficient business to warrant its construction. 49 U.S.C. § 11103(a). Mr. Wisener of SAW has instructed me to continue his prior attempts to determine from Floyd Trucking the volume of rail traffic that it would furnish. I intend to do so. Pending that determination, it is my opinion that a complaint against SAW would be premature.

Very truly yours,

Tom McFarland

Thomas F. McFarland
Attorney for South Plains Switching, Ltd. Co.

THOMAS F. McFARLAND

Mr. Melvin F. Clemens, Jr.

February 26, 2003

Page 2

cc: Larry Wisener) *by fax to 806-828-4863*
Bill Power) *by fax to 817-478-9643*
Dennis Olmstead) *by fax to 630-469-0531*

LAW OFFICE
THOMAS F. MCFARLAND, P.C.
208 SOUTH LASALLE STREET - SUITE 1890
CHICAGO, ILLINOIS 60604-1194
TELEPHONE (312) 236-0204
FAX (312) 201-9695
mcfarland@aol.com

THOMAS F. MCFARLAND

February 26, 2003

**Mr. O.E. Floyd
Floyd Trucking, Inc.
P.O. Box 50
Brownfield, TX 79319**

Dear Mr. Floyd:

I represent South Plains Switching, Ltd. Co. (SAW).

In order to determine the propriety of construction of a switch connection to trackage at your place of business at Lubbock, TX, please provide your estimate of the volume of rail traffic that would be transported as a result of that connection and the basis for that estimate.

Very truly yours,

Tom McFarland

**Thomas F. McFarland
Attorney for South Plains
Switching, Ltd. Co.**

TMcf:kl:wp8.00921\ltroef1

**cc: Mel Clemens, STB
Larry Wisener, SAW
Bill Power
Dennis Olmstead**



Surface Transportation Board
Washington, D.C. 20423-0001

March 7, 2003

Office of Compliance and Enforcement

1925 K Street, N.W., Suite 780
 Washington, DC 20423-0001

202-565-1573
 FAX 202-565-9011

Mr. Thomas F. McFarland, Esq.
 208 South LaSalle Street, Suite 1890
 Chicago, IL 60604-1194 (And by Facsimile (312-201-9695))

Re: South Plains Switching, Ltd. Co.,
 Service to Floyd Trucking, Lubbock, Texas

Dear Mr. McFarland:

This confirms receipt of your letter to me of February 26th, informing me that you have been retained by Larry Wisener, of South Plains Switching Ltd. Co. (SAW), and Mr. Wisener's letter of February 25th, responding to my February 20th notice to SAW of my intention to proceed with a complaint against SAW for its failure to fulfill its common carrier obligation by refusing service to Floyd Trucking, a shipper on SAW's line in Lubbock.

I appreciate your opinion that a complaint against SAW is premature, however, I do not agree. This entire matter is predicated upon Mr. Wisener's unilateral action to remove the switch connecting Mr. Floyd's facility to SAW's line. Now, Mr. Wisener has set an unsubstantiated and, in my view, exorbitant cost (\$30,000) to replace the switch-connection that he removed. Apparently, he believes that he should be made whole by the shipper for costs entirely associated with his actions, which is not contemplated by the statute. As I outlined in my February 20th letter to Mr. Wisener, the statute places an affirmative obligation on a rail common carrier to construct, maintain, and operate switch connections when such is reasonably practical. In this case the construction was done and, except for Mr. Wisener's unilateral actions, the existing switch would likely have required only maintenance. Also indicated in my letter to Mr. Wisener of February 20th, was my expectation that, based on the ample time Mr. Wisener has had to resolve this situation, resolution would occur finally by February 28th. Instead, you and Mr. Wisener have only placed additional demands on Mr. Floyd.

This is to inform you that I intend to move forward with the complaint, and an investigation of all of Mr. Wisener's operations. As Counsel, you may want to advise Mr. Wisener of the breadth of the Board's authority with respect to determining damages, making findings of unreasonable practice, and the possible issuance of an order revoking his authority for obstruction of interstate commerce and any other unlawful acts.

OPTIONAL FORM NO 7-99

FAX TRANSMITTAL

From: <u>Tom McFarland</u>		# of pages: <u>1</u>
To: <u>Mr. Clemens</u>	Date: <u>STB</u>	
Fax # <u>312-201-9695</u>	Fax #	

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GENERAL SERVICES ADMINISTRATION

Sincerely,

Melvin F. Clemens, Jr.
 Director

cc: Mr. O.E. Floyd, Floyd Trucking, Inc.